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# Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 284

DANIEL A. BENSON,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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No.

DANIEL A. BENSON,
*Petitioner,*
*v.*
UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner Daniel A. Benson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above case on May 25, 1966. (R. 1060.)

### Citation to Opinion Below.

The opinion of the Court of Appeals (R. 1051) is not yet reported. It is printed as Appendix A below, p. 22.

### Jurisdiction.

The judgment of the Court of Appeals was entered on May 25, 1966. (Appendix C, p. 33, *infra.*) The jurisdiction

of this Court is invoked under 28 U.S.C. § 1254(1) The filing of the petition is governed by Rule 22 (2) of the Rules of this Court.

**Questions Presented.**

1. Assuming in a criminal case that there is evidence to warrant finding a bilateral and conspiratorial relationship between each one of three individual defendants and an aider and abettor (a so-called "wheel" conspiracy), whether incriminating evidence of the acts and statements of one of the individual defendants (a "spoke") is admissible against another individual defendant, where there is no evidence that the latter had any knowledge of an improper relationship of the aider and abettor (the "hub") with any other person or persons.

2. Whether moneys, assumed here to have been improperly received as a kickback by a railroad official from a purchaser of equipment of the railroad, are assets of the railroad within 18 U.S.C. § 660 (forbidding misapplication or conversion of assets of common carriers), where it does not appear that the official acted as an agent of the railroad in receiving said moneys.

3. Whether a single count of an indictment under 18 U.S.C. § 660, sufficiently specifies an offense against the United States which charges that officials of a railroad did, by arranging and permitting a transaction in which ten cars of the railroad were sold to another party for $250,000, wilfully misapply and permit to be misapplied railroad assets; and did wilfully convert moneys and assets of the railroad, to wit, $71,500, where other portions of the count, though containing details of the charge, do not make it clear whether the assets involved are the cars or the $71,500.

## Statute Involved.

The statute (18 U.S.C. § 660) is set forth in Appendix B (p. 32, *infra*).

## Statement of the Case.

Petitioner was indicted on August 13, 1963 (R. 1) along with Patrick B. McGinnis, George F. Glacy, the Boston & Maine Railroad ("B & M"), International Railway Equipment Corporation ("International"), and Henry Mersey. The indictment was in two counts, Count One being under section 10 of the Clayton Act (15 U.S.C. § 20), and Count Two under 18 U.S.C. § 660. The District Court had jurisdiction under 18 U.S.C. § 3231. Count One was before this Court in *United States* v. *Boston & Maine Railroad*, 380 U.S. 157, but, after the case was returned to the District Court and had gone to trial on both counts, the Court, on the motion of the Government, dismissed the first count. (R. 10 and 109.) The dismissal of Count One resulted in B & M being dropped from the case.

Count Two (R. 17-21) charged that McGinnis, Glacy and petitioner, officers of the Boston & Maine Railroad, by arranging a transaction in which ten B & M stainless steel cars were sold to International for $250,000, wilfully misapplied and wilfully permitted to be misapplied moneys, property and assets of B & M and wilfully converted to their own use moneys of B & M to wit: $71,500. (R. 18-19.) Count Two further alleged that this was accomplished by arranging to sell the ten cars to International for $250,000; that on the day after title passed to International that corporation resold the coaches to another railroad for $425,000; that $71,500, almost all of which came out of the proceeds of this resale, was paid over on various dates in various amounts to McGinnis, Glacy and petitioner. (R.

19-20.) And, finally, it was charged that the officer defendants withheld these moneys from B & M. International and Mersey were charged with aiding and abetting McGinnis, Glacy, and petitioner. (R. 20.)

Petitioner filed a motion for particulars and a motion to dismiss the indictment on the grounds of indefiniteness and failure to state an offense. (R. 26-29.) These motions were denied so far as is now material. (R. 38-39.)

The evidence introduced before the jury warranted it in finding the following facts, stated in the light most favorable to the Government. Important evidence at the trial was conflicting, but the conflicts are of necessity here resolved to the advantage of the Government.

In 1958 McGinnis was president of the Boston and Maine Railroad (R. 370); petitioner was vice-president in charge of operations (R. 555); and Glacy was vice-president of finance and accounting (R. 425). Petitioner's duties were to supervise and direct all train operations and maintenance of equipment. (R. 555.)*

Mersey was the sole owner of International (Ex. 36, R. 787; R. 343), which occupied offices at 150 Causeway Street, a building which housed the main office of B & M. (R. 164.)

In 1947 B & M had purchased twelve stainless-steel cars which were designed to operate as a deluxe train. These included two dining cars, two baggage and passenger combination cars and eight passenger coaches. (R. 426.) In 1957 B & M, having decided to discontinue dining service, sold the dining cars for $52,500 each to an equipment dealer, Waldo E. Bugbee, of San Antonio, Texas, who (along with railroads and others) had received a usual type of circular advertising the diners. (Ex. 60, R. 807;

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*The opinion of the Court of Appeals incorrectly assumes that petitioner's "duties related to the sale and purchase of equipment." There is no support in the record for such a statement. (See p. 28, *infra*.)

R. 177-179.) B & M was then represented by one Bolton, its director of purchases and stores.

On April 30, 1958, Bugbee called at the B & M offices and asked Bolton about an option on the remaining ten stainless-steel cars. (R. 94; Ex. 82, R. 831, fixing date.) Bolton said he could not do anything about it and introduced Bugbee to Glacy, Bolton's superior. (R. 95.) Bugbee asked Glacy for an option to purchase the cars at $50,000 apiece, but Glacy refused. (R. 187-188.) Bugbee then returned to Texas. (R. 188.)

On the same day, April 30, petitioner went by plane with Mersey (R. 616, 623) to Bangor, which was the headquarters of the Bangor & Aroostook Railway, where they looked at equipment. Both fares were paid for by B & M. (R. 601.)

On the day before, April 29, petitioner had issued a letter to Glacy listing surplus passenger equipment but not including the ten stainless-steel cars. Petitioner's file copy (Ex. 21, R. 773) of this letter was later found in the possession of International and, in Mersey's handwriting, bore the words "Add 10 stainless steel coaches not on list, request photos and prints." (R. 58.) A notation on a memorandum attached to another copy of this letter indicated that prints of the ten cars were sent to Mersey from petitioner's department on May 1. (Ex. 70, R. 817.)

In the meantime, Bugbee spent two or three days in Dallas and returned to San Antonio late on Friday, May 9. On returning to his office on the 10th he was told that somebody in Boston had been endeavoring to reach him on the telephone. (R. 190.) That Saturday night, May 10, Mersey telephoned Bugbee, introduced himself and indicated that the ten B & M cars were available, and that Bugbee could get them through him. On May 14 Mersey telephoned Bugbee again. In this conversation Mersey said that he controlled the cars, that a deal was pending, and

that the price would average out at about $50,000 per car. (Ex. 81, R. 819.)

Early in June Glacy told Bolton that a decision had been made to sell the stainless-steel coaches and that they were to be sold to Mersey. Bolton asked him why. Glacy told him that "Mr. McGinnis wanted to handle it in that manner." (R. 99.) When Bolton raised the question "as to how about Bugbee because he was interested in the passenger coaches," Glacy told Bolton that he was to do nothing regarding attempting to sell the cars. (R. 101.)

Mersey telephoned Bugbee on June 25 and reported that McGinnis had complained to him (Mersey) that Wabash, Bugbee's intended customer, who had in 1957 bought the diners, had tried to deal directly with McGinnis. (Ex. 80, R. 825.) Mersey told Bugbee he had the situation in hand and had so informed McGinnis. Bugbee said he could not get Wabash to increase its price beyond $50,000 per car, although Mersey said that it would inhibit his style because of some "commitments" he had. (*Ibid.*)

On June 26, 1958, the day following this telephone conversation, Glacy wrote a memorandum to petitioner, asking whether the ten cars could be retired and, if so, what should be the asking price. Glacy stated that Bangor & Aroostook had offered their similar steel cars in the low $20,000's and that the Seaboard Airline, after looking at the B & M cars, had recently purchased elsewhere. (Ex. 41, R. 799; Ex. V, R. 970.)

On June 30 petitioner wrote a memorandum to Glacy referring to the latter's letter of June 26 "re our 10 stainless steel passenger cars. It is my opinion we can retire these cars for sale and put them on the market for about $30,000 each." (Ex. 40, R. 797.)

On July 17, 1958, in the course of a three-way telephone conversation between Mersey, Bugbee and a Wabash rep-

resentative (Barrett), the price of $425,000, or $42,500 per car, was verbally agreed upon. (R. 195, 264.)

On July 18 Glacy again sent a memorandum to petitioner stating: "I assume that when you evaluated these cars at $30,000 each you had in mind that the Railroad might peddle the cars individually over a period of time. I have at present a firm offer of $250,000 for the ten coaches. The prospective buyer, however, will not take fewer than ten cars but insists on the entire lot for the above-mentioned price. I understand that the New York Central is peddling similar stainless steel coaches and has sold several at prices between $20,000 and $22,000 each." Glacy asked petitioner for his opinion on the acceptance or rejection of this offer of $250,000 for the ten coaches. (Ex. 39, R. 797.) Petitioner on July 21 sent Glacy a letter, prepared by one of petitioner's subordinates (see Ex. W, R. 671), in which he agreed "that if we can dispose of the eight stainless steel coaches and the two stainless steel combines as a package, we could afford to let them go at $25,000 each. Eliminating an entire series of cars such as these will enable us to cut out all the maintenance work on such items as are peculiar to these cars, and eliminate the protective material we are now carrying in stock for this purpose." (Ex. 38, R. 796.)

Following receipt of this letter Glacy prepared a memorandum to serve as a basis for an item on the agenda at the forthcoming directors' meeting. This memorandum, after outlining the acquisition and use by B & M of the ten cars, stated: "In view of the fact that the market is swamped with secondhand passenger equipment for sale, as is evidenced by our recent experience with Seaboard Airline who were practically ready to buy these coaches from us and then ended up by purchasing similar equipment at a price of $20,000-$22,000 from the New York Central, Mr. Benson and I recommend that we accept the offer

of $250,000 for these ten passenger units." (Ex. 42, R. 801.)

The statements in the last paragraph were erroneous. While it is true that Seaboard Airline had examined these coaches, they were never "practically ready to buy" them. The "similar equipment" which they purchased was not from the New York Central at a price of $20,000-$22,000, but from Chesapeake & Ohio for $84,000 apiece. (R. 280, 281, 287.)*

The meeting was held on July 23, and the matter was favorably and unanimously voted. (Ex. 88, R. 864.) Petitioner was not then a member of the B & M board of directors.

After some correspondence between Mersey and Bugbee (Ex. 79, R. 822, and Ex. 29, R. 781), on August 1 Wabash's subsidiary, New Jersey, Indiana & Illinois Railroad Company ("N J I & I"), addressed to International c/o Bugbee at San Antonio, a letter containing a formal order to cover the ten cars at $42,500 each, or a total of $425,000. (Ex. 33, R. 784.)

Glacy executed a bill of sale conveying the cars from B & M to International on August 14 for a total consideration of $250,000. (Ex. 24, R. 777.) By a bill of sale executed and attested August 15, 1958, International conveyed the cars to N J I & I. (Exs. 83, 84, R. 833, 834.)

The usual practice of B & M in connection with the sale of land or equipment is to require certified checks from the purchaser upon delivery of the instruments transferring title (R. 303). In this case, however, the check for $250,000

*The documentary evidence indicates that the part of the agenda for the directors' meeting relating to the sale of the cars was prepared on the same day as the Glacy memorandum. A copy of it was made part of the agenda, the only alteration being that, instead of "Mr. Benson and I recommend" (in the next to the last line), the agenda memorandum read: "management recommends." (Ex. 89.)

drawn by International, signed by Mersey, was postdated August 22, 1958 (Ex. 22, R. 774), and the check was turned over to Glacy. (Ex. 90, R. 865.) It was deposited to the Boston and Maine account and cleared on August 25. (Ex. 22, R. 774.)

In the meantime the check of N J I & I payable to International for $425,000, dated August 18, 1958, was received and deposited by International in its account in the Boston bank on August 20, 1958. (Ex. 85, R. 835.)

Up to the time of the deposit of this check International did not have and never had had in its account sufficient funds to pay for the cars. (R. 338.)

International made payments aggregating $71,500 to McGinnis, Glacy and petitioners as follows (see Exs. 1A-3C, R. 761-768):

| | | |
|---|---|---|
| McGinnis | October 10, 1958 (2 checks) | $20,000 |
| " | December 3, 1958 | 15,000 |
| Glacy | August 22, 1958 | 12,500 |
| " | August 29, 1958 | 12,500* |
| Petitioner | August 13, 1958 | 5,000 |
| | October 9, 1958 | 1,500 |
| | December 16, 1958 | 5,000 |

Petitioner's testimony as to the basis of the payment of $11,500 by International to him was that he had worked for Mersey as a consultant in 1957 (R. 569-571); that he was later asked by Mersey to act as a consultant in a study of certain B & M branch lines or short lines, acquisition of which Mersey was considering (R. 571-572, 578); and that he prepared reports in 1958 on the short lines, acting

*Glacy's two checks bore consecutive numbers and appear to have been drawn the same day. (Ex. 34, Sheet #CD15, showing checks drawn for August, 1958.)

as a consultant at $250 per day and using information of B & M which he said was not confidential and would have been supplied free to any prospective purchaser. (R. 573-575.) Cross-examination by Government counsel brought out that petitioner's consulting work involved him, or soon would have involved him, in a conflict of loyalty between B & M and International. (R. 611-614.)

During the presentation of the Government's case, various acts and statements of McGinnis and Glacy were introduced in evidence against McGinnis and Glacy as defendants respectively, but not against petitioner. The trial judge informed the jury that such evidence as a check might be offered only against one defendant, but that "it may later on be tied up in some way that the Government can offer it as against one or more defendants." (R. 50-51.) Such evidence not introduced against petitioner included the payments to Glacy (R. 53), the payments to McGinnis (R. 54), the postdated $250,000 check of International to B & M of August 22, 1958 (R. 59), International's bank statements for February through August of 1958 (R. 75), the shipping instructions from International showing the destination of the cars as the Wabash (R. 104-105), the statement by Glacy to Bolton regarding McGinnis's wishes as to the handling of the cars by Mersey (R. 111-112), International's bank statements from September through December of 1958 (R. 173), the conversation between Bugbee and Glacy at the B & M offices on April 30, 1958, when Glacy refused to give Bugbee an option on the ten cars (R. 185-188), and McGinnis's question of Mersey (as reported in the Bugbee-Mersey telephone talk of June 25, 1958) as to whether Mersey had the situation in hand (R. 201, 250, 253).

Near the close of the Government's case, however, the Government moved that all evidence which had been received against any defendant be received against all de-

fendants on the ground that there had been ample showing of a common plan. (R. 349.) The Court allowed the motion over objections of the defendants and instructed the jury then and again in the charge to the jury that the acts or statements of one defendant could properly be used as against all the defendants. (R. 359, 685-686.)

Petitioner's motions to acquit at the conclusion of the Government's case (R. 715) and at the close of all the evidence (R. 729) were both denied. (R. 11-12.) Following the jury's verdict of guilty, the trial Court entered judgment against petitioner and sentenced him to imprisonment for eighteen months and a fine of $5,000. (R. 749.)

## Reasons for Granting the Writ.

### I. Admission of Evidence of Supposed Conspirators.

There was no direct proof of any improper agreement or common plan between petitioner on the one hand and McGinnis and Glacy on the other. The question is whether, assuming that there was evidence warranting the trial judge in inferring that the jury could find that petitioner conspired with Mersey, the acts and statements of McGinnis and Glacy were admissible to prove petitioner's guilt when the only evidence of a common plan was the interlocking of events in the manner set forth rather than knowledge of the petitioner.

The present state of the federal law has been well summarized in Note, "Federal Treatment of Multiple Conspiracies," 57 Col. L. Rev. 387, 388-389: "Although the hub may view his dealings with each spoke as part of a single large enterprise, the spoke is ordinarily concerned merely with his own transaction and is generally not held to have conspired with other spokes unless it can be inferred that their existence was known to him. When such knowledge is shown, it may be fairly said that the spoke

was aware of, and thus consented to, the over-all plan as envisaged by the hub. To dispense with the requirement of demonstrating knowledge of the existence of other spokes is to refuse to distinguish between the agreement as seen by the hub and that viewed by the spokes. Under this approach, a finding of a single conspiracy is unduly facilitated by holding each spoke to the scope of the broader plan. Although a few cases have manifested such a tendency, their present vigor seems questionable." Note, "Federal Treatment of Multiple Conspiracies," 57 Col. L. Rev. 387, 388-389. See also American Law Institute, Model Penal Code, Tentative Draft No. 10, pp. 120-126.

The opinion of the Court of Appeals (App. A, pp. 30-31, *infra*) dealt with this issue by stating: "Even if there were merit in the defendant officers' contention that there was no direct evidence that any of them conspired with each other, a contention which leaves a number of matters unanswered, there was clear evidence that each conspired with Mersey. It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defendants, rather than three isolated bilateral agreements."

With respect to petitioner, the Court of Appeals emphasized his apparent acquiescence in Glacy's misstatement of the figure at which Seaboard Airline had purchased supposedly similar cars from New York Central.* It is, how-

*Glacy's own office file copy of his memorandum to petitioner of June 26, 1958 (Ex. 41, R. 799), contained a notation in Glacy's writing that "NYC sold for between 20,000 and 22,000 each." Glacy's memorandum to petitioner of July 18, 1958, stated: "I understand that the New York Central is peddling similar stainless steel coaches and has sold several at prices between $20,000 and $22,000 each." (Ex. 39, R. 797.) Glacy's July 22, 1958, memorandum for use in preparing an agenda for the directors' meeting contained the misstatement as set forth above at page 7.

ever, piling inference upon inference to conclude from that kind of evidence that petitioner knew Glacy was supposedly doing something wrong, let alone that McGinnis was enriching himself at the expense of B & M.

Petitioner's functions were to supervise and direct train operations and maintenance of equipment. He had charge of the handling of station agencies and personnel. He made recommendations regarding capital improvements. (R. 555-556.) His background and experience lay in his various railroad jobs: cleaner and repairer of locomotives, then yard clerk, then promoted to yard brakeman, then yard conductor, passenger trainman, passenger baggage master, passenger ticket collector, conductor, yard master, then train master, terminal superintendent, assistant general superintendent, then assistant to the president making studies of operations and maintenance. (R. 554.)

There is no basis in this for the inference of a general conspiracy. Petitioner's failure to contradict Glacy does not lead to the conclusion that petitioner knew Glacy was acting illegally rather than that it was due to inadvertence, ignorance or carelessness.

The result in this case is foreshadowed in an opinion of Judge Learned Hand written nearly thirty years ago: "At times it seemed to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it. The confusion is perhaps due to the fact that everything done by the conspirators—including the declarations of later entrants—is competent evidence against all, so far as it may fairly be thought to

be in execution of the concert to which the accused is privy, though that doctrine too is often abused." *United States* v. *Peoni*, 100 F. 2d 401, 403 (2d Cir.).

Petitioner believes that the decisions of this Court, although distinguishable factually, reflect an approach which does not permit the result reached by the Courts below. Evidence that an individual accused knows or has reason to know that he and a person with whom he deals are acting illegally does not without more warrant an inference that others dealing with that person are also advancing an illegal end. In *United States* v. *Falcone*, 311 U.S. 205, it was held that respondents' knowledge that materials supplied by them would be used in making illegal liquor fell short of showing respondents' participation in a conspiracy or that they knew of it. In *Kotteakos* v. *United States*, 328 U.S. 750, 755, when the Government characterized the transaction there involved as having a pattern "of separate spokes meeting in a common center," this Court added that the pattern was "without the rim of the wheel to enclose the spokes." It was there held erroneous to charge the jury that there was a single conspiracy. And in *Blumenthal* v. *United States*, 332 U.S. 539, where the Court ruled that the evidence warranted a finding of a single conspiracy at prices over OPA levels among the two operators of Francisco Company and the three salesmen who sold whiskey for Francisco, the opinion based the ruling as to the salesmen on the following observation: "True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan."

The present case is not the *Blumenthal* situation, where the salesmen were participants in a common plan "joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their

common single goal." 332 U.S. at 558. The facts in the Government's case do not meet the standard set forth in that opinion, because there was no showing that petitioner knew that Mersey or International had conspired with any other person or persons or that there was any "larger plan," however indefinite its scope. Compare American Law Institute, Model Penal Code, § 5.03(2), requiring such a showing of knowledge in order to widen the area of a conspiratorial relationship. There was no proof or basis for inferring that petitioner had any idea that any other B & M officials had received or were receiving payments from Mersey or International, whether or not derived from the proceeds.

Settlement of the question here presented is in the public interest because of the fact that conspiracy cases are an important part of federal criminal litigation. The present case presents a distinct issue in applying the assumptions of *Blumenthal* v. *United States* which is appropriate for decision in this Court. The inquiry called for by the American Law Institute's test, of which *Blumenthal* is said to be illustrative (Tentative Draft No. 10, *supra,* p. 12, at 124), "will often be more detailed and sometimes will be more complicated than that called for under looser, current doctrine. We submit that any greater difficulty involved is justified by the need for effective means of limiting a conspirator's criminal liability and preventing the other abuses possible under looser approaches toward the scope of a conspiracy. Further, we submit that the focus upon each individual's culpability with regard to each criminal objective should be more helpful to juries than the broad formulations with which they are often charged today; and that it accords more closely with traditional standards for testing criminal liability." (*Ibid.,* 126.)

## II. The Status of Kickbacks.

An important question of federal law which has not been, but ought to be, settled by this Court is whether or not a misapplication or conversion of an employer's funds or assets under a federal statute (see the banking statute, 18 U.S.C. § 656, as well as the carrier statute in § 660) arises out of the improper receipt of money from another party by a corporate officer in connection with a corporate transaction.

So far as petitioner is aware, there is no prior decision going so far as to hold that such a receipt of money constitutes criminal misapplication, embezzlement or conversion of assets of the employer. The decision of the Court of Appeals is at odds with the reasoning of the decisions of the Eighth Circuit in *Berra* v. *United States,* 221 F. 2d 590, 593-594, and the Second Circuit in *United States* v. *Bruswitz,* 219 F. 2d 59, 61-62. Those cases ruled that receipts of kickbacks were not embezzlements, and hence not free of income taxation under the doctrine of *Commissioner* v. *Wilcox,* 327 U.S. 404.

And yet the District Court permitted the jury to convict on the basis of petitioner's having received $11,500 of B & M's money.* The Court of Appeals, in affirming the conviction of petitioner, stated: "The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad." (P. 25,

*E.g.,* "The only statute before us is the one here, and we are concerned with the one point, I think, did these defendants receive part of the consideration that Mersey received for the sale of the ten cars, by diverting some of it into their own pockets?" (R. 684.)

*infra.*) This is in the light of the following specific instruction of the District Court: "Then they [the defendants] say on all the evidence the moneys paid by New Jersey, Indiana & Illinois Railroad Company to International Railway Equipment Corporation for the purchase of the cars became the moneys of International Railway Equipment Corporation. And I charge you that that is the law." (R. 700.)

Decisions under the banking statute (U.S. Rev. Sts., Title LXII, c. 3, § 5209, now 18 U.S.C. § 656), from which 18 U.S.C. § 660, was derived, have assumed and held that a conversion of the bank's assets can only be found with respect to assets in which the bank had some proprietary interest. *Hudson* v. *United States,* 55 F. 2d 591, 594 (8th Cir.). *Golden* v. *United States,* 318 F. 2d 357, 361 (1st Cir.). *Groves* v. *United States,* 343 F. 2d 850, 851 (8th Cir.). See also *Heath* v. *United States,* 209 F. 2d 318 (9th Cir.), under the similarly worded 18 U.S.C. § 641. The present decision is irreconcilable with those cases.

Further, only this Court, by granting certiorari, is in a position to resolve the confusion that would result if the present decision under a general misapplication statute is left undisturbed. There are already statutes in the field of transportation dealing with commercial bribes and kickbacks. 49 U.S.C. § 1 (17) (b), prohibits the giving and receiving of bribes to influence railroad employees in regard to traffic decisions. By 49 U.S.C. § 20a (12), it is made unlawful for railroad officers to receive money or value in connection with transactions in securities. See generally Note, "Control of Nongovernmental Corruption by Criminal Legislation," 108 U. of Pa. L. Rev. 848; and Annotation, "Validity and Construction of Statutes Punishing Commercial Bribery," 1 A.L.R. 3d 1350.

## III. The Sufficiency of the Indictment.

The Court of Appeals, by upholding the indictment, avoided mentioning *Russell* v. *United States*, 369 U.S. 749, possibly accepting an argument of the Government that the *Russell* case applied only in the field of Congressional investigations. Petitioner believes that the decision on the sufficiency of the indictment is in conflict with the opinion in *Russell*, and that the writ should be granted for that reason.

The uncertainty in the indictment is that it presents two inconsistent charges.

The key paragraph 11 (R. 18-19) charges misapplication of the cars and then charges conversion of $71,500, the amount received by the officer defendants. The two charges cannot stand consistently together in the same count, and the result is that paragraph 11 presents petitioner with a dilemma. He cannot know, and does not now know, whether he is convicted of converting the cars or the money.

The Government's theory of the case was that the defendant officers had, by receiving the money from International, converted B & M property. We have set forth in a footnote part of the opening of the Government as illustrative of this theory, which the Government has retained through the proceeding.*

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*"Another statute also mentioned in count two of the indictment, Section 2 of Title 18 of the United States Code, provides that anyone who aids or abets in the commission of an offense against the United States, such as a violation of Section 660, is equally responsible and equally guilty, along with the railroad officer or director who committed the violation of Section 660.

"So in count two Patrick B. McGinnis, George A. Glacy and Daniel A. Benson are named as the defendants who violated Section 660, while International Railway Equipment Corporation and Henry Mersey are also named as defendants but are charged with

The Court of Appeals, however, and possibly the District Court also, gave the indictment a different reading:

> "The offense charged was the improper sale at a known inadequate price, to a fraudulent middleman, with defendants' intended acquisition and retention of the proceeds, all part of the one grand design. . . . The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad." (Pp. 24-25, *infra*.)

While the concept of misapplication is not restricted to technical embezzlement, the consequence of that is not to relax the requirements of the Fifth Amendment with regard to specification of the offense. This Court, after saying that the concept of misapplication has no settled technical meaning, indeed has gone on to hold that for precisely that reason the words "wilfully misapplies" must be "supplemented by further averments, showing how the misapplication was made, and that it was an un-

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having aided and abetted the railroad or the defendants in their violation of Section 660.

"The violation of Section 660 which is charged against the defendants McGinnis, Glacy and Benson in count two, arises from the fact that by arranging and carrying out the sale of these ten stainless steel coaches to International Railway Equipment Corporation [9] for $250,000, they willfully misapplied and willfully permitted to be misapplied, and willfully and knowingly converted to their own use, the $71,500 which International Railway Equipment Corporation paid to them out of the $425,000 which it got by reselling the cars to the Wabash Railroad, $71,500 which rightfully and legally belonged to the Boston & Maine Railroad, in whose property they were dealing." (R. 43.)

lawful one." *Batchelor* v. *United States,* 156 U.S. 426, 429, and cases there cited.

The present indictment is defective, not on the ground that it fails to give details, but because it fails to charge the offense. There is an obvious distinction between a defendant's "constitutional right to know what *offense* is charged" and "his need to know the *evidentiary details* establishing the facts of such offense." *Van Liew* v. *United States,* 321 F. 2d 664, 670 (5th Cir.).

*Russell* v. *United States,* 369 U.S. 749, condemns every indictment which leaves "the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." 369 U.S. at 768.

The factors pointed out in *Russell* exist in this case. The indictment here left a major issue undefined. It plainly enables the conviction "to rest on one point and the affirmance of the conviction to rest on another." 369 U.S. at 766. On the present record, petitioner believes that that in fact is what has happened.

The spirit of the decision of the Court below is at odds with two decisions in the Seventh Circuit applying the *Russell* case. *Lauer* v. *United States,* 320 F. 2d 187 (7th Cir.) (holding that under *Russell* an indictment had to identify the person to whom narcotics were alleged to have been illegally sold). *Beitel* v. *United States,* 306 F. 2d 665 (7th Cir.) (holding that an indictment of a bankrupt for having concealed assets of a specified value had to identify the assets). The First Circuit has already rejected *Lauer* v. *United States* in *Sanchez* v. *United States,* 341 F. 2d 379, 380 (1st Cir.); cert. den. 381 U.S. 940, 945.

There is, moreover, confusion as to whether *Russell* has any application outside the field of Congressional investigations. The Government has argued that it has not, and for this view there is no explicit support in the cases. How-

ever, a limitation on *Russell* has been advanced in Cipes, Moore's Federal Practice—Rules of Criminal Procedure, par. 7.04 ("But the facts in *Russell* were unique and its scope will undoubtedly be confined"); in a case note on the *Russell* decision in 41 Tex. L. Rev. 590, 594 ("The dissenting opinions in the *Russell* case express the fear that this holding will lead to a requirement of detailed indictments in all criminal cases contrary to Rule 7(c) of the Federal Rules of Criminal Procedure. The present case can be distinguished in that the statutory basis of this indictment involves a first amendment problem not found in other criminal statutes"); and in Note, "The Supreme Court, 1961 Term," 76 Harv. L. Rev. 54, 103. Petitioner accordingly submits that the applicability of *Russell* in cases outside the First Amendment area, although expressly affirmed by the Fifth and Seventh Circuits, is a further important question of federal law which has not been, but should be, settled by this Court.

**Conclusion.**

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLAUDE B. CROSS,

JOHN M. REED,

Counsel for Petitioner.

[Appendix follows.]

## Appendix A.

### United States Court of Appeals
### For the First Circuit

No. 6652.

GEORGE F. GLACY,
DEFENDANT, APPELLANT,
*v.*
UNITED STATES OF AMERICA,
APPELLEE;

No. 6653.

DANIEL A. BENSON,
DEFENDANT, APPELLANT,
*v.*
UNITED STATES OF AMERICA,
APPELLEE;

No. 6662.

HENRY MERSEY ET AL.,
DEFENDANTS, APPELLANTS,
*v.*
UNITED STATES OF AMERICA,
APPELLEE;

No. 6666.

PATRICK B. MCGINNIS,
DEFENDANT, APPELLANT,
*v.*
UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

*Edward O. Proctor* for George F. Glacy, appellant.

*Claude B. Cross*, with whom *John M. Reed* and *Withington, Cross, Park & McCann* were on brief, for Daniel A. Benson, appellant.

*Edward F. Myers*, with whom *Cornelius J. Sullivan* and *Holtz, Sullivan & Zonderman* were on brief, for eHnry Mersey et al., appellants.

*William T. Griffin*, with whom *Lawrence R. Cohen* and *Newton H. Levee* were on brief, for Patrick B. McGinnis, appellant.

*John F. Dougherty*, Attorney, Department of Justice, with whom *Donald F. Turner*, Assistant Attorney General, *W. Arthur Garrity, Jr.*, United States Attorney, and *Howard E. Shapiro* and *Richard A. Wegman*, Attorneys, Department of Justice, were on brief, for appellee.

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OPINION OF THE COURT.

May 25, 1966.

ALDRICH, *Chief Judge*. The defendants, McGinnis, Glacy, and Benson, president, vice-president in charge of finance and accounting, and vice-president in charge of operations, respectively, of the Boston & Maine Railroad, were convicted of misapplying[1] assets of the railroad. Defendants Mersey and International Railway Equipment Corporation, hereinafter collectively, Mersey,[2] were convicted of aiding and abetting. We will deal with the evidence later at more length. Briefly, the government showed that defendant officers presented to the railroad's board of directors a proposal to sell ten stainless steel passenger cars

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[1] "[E]mbezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets . . . or willfully or knowingly converts the same to his own use or to the use of another. . . ." 18 U.S.C. §660.

[2] Mersey was the principal officer and representative, as well as sole stockholder of International.

for $250,000, an unreasonably low price, and obtained approval by false statements of what similar cars were selling for; that they caused the cars to be sold for that price to Mersey, the railroad receiving payment only after Mersey had sold to another road which was already committed to buy for $425,000; that Mersey thereafter paid the defendant officers, individually and respectively, $35,000, $25,000 and $11,500, or a total of $71,500, much of which was actual proceeds of the sale.[3] All defendants moved unsuccessfully for a dismissal of Count 2 of the indictment, the one on which they were convicted,[4] and for directed verdicts of acquittal for joint and, in most instances, individual reasons. The appeals raise certain further issues.

A basic matter, which defendants presented in various manners,[5] is a supposed distinction between misapplying the cars and misapplying the proceeds. We are unimpressed, as was the district court, whose analysis of the issue and exposition to the jury was a model of simplicity and clarity.

The offense charged was the improper sale at a known inadequate price,[6] to a fraudulent middleman,[7] with de-

[3] The fact that the proceeds could be specifically traced becomes relevant in a later matter, but does not enter into our decision that the offense was made out.

[4] Count 1, after having gone to the Supreme Court, *United States v. Boston & Maine R.R.*, 1965, 380 U.S. 157, was dismissed during trial.

[5] The defendants' attacks on the indictment, demands for particulars, motions for acquittal and a number of their refused requests for instructions, directly or indirectly raised this issue.

[6] It is this aspect of the case that distinguishes it from the state decisions cited by the defendants. We agree that the agents there entrusted to sell property, whether potatoes, watermelons, bonds, stock, automobiles, or spreaders, could not be convicted of conversion of the proceeds on a charge of converting the property. In

[7] (See opposite page.)

fendants' intended acquisition and retention of the proceeds, all part of the one grand design. The statute is not restricted to technical embezzlement, but embraces the broader concept of misapplication. *Cf. Batchelor* v. *United States,* 1895, 156 U.S. 426; *United States* v. *Mulloney,* D. Mass., 1934, 8 F. Supp. 674, *aff'd,* 79 F.2d 566, *cert. den.* 296 U.S. 658; *Kramer* v. *United States,* 4 Cir., 1951, 190 F.2d 712, 717-18. The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad.[8]

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those cases the sales were fully authorized. In the case at bar if defendants' only misconduct had been to intercept and pocket proceeds of an honest sale, the present indictment would have been inappropriate. But that is not this case. The defendants were charged with a larger offense. The district court's instruction laid this issue on the line.

> "If what these defendants did was bad judgment in selling the cars at the price for which they sold them, or was stupidity and nothing more, then they are not responsible. They have a wide degree of latitude in the exercise of their judgment. But willfulness means that they intended to do what they did, and did it voluntarily, and with a specific intent, or bad purpose, the bad purpose being to line their own pockets at the expense of the Boston and Maine."

The statement, made in oral argument by one of the defendants, that the "court put to the jury that the only question was whether the defendants converted the money," if the charge is taken as a whole is simply not so.

[7] Mersey, because he took title, objects to being described as a middleman. It is clear on the government's evidence, however, that the cars passed through him as part of the original scheme, in order to siphon off what rightly should have gone to the railroad.

[8] For this latter reason cases such as *Heath* v. *United States,* 9 Cir., 1954, 209 F.2d 318, and *Golden* v. *United States,* 1 Cir., 1963, 318 F.2d 357, are inapposite. In Heath it conclusively appeared that the property had ceased to be government property before it

The indictment fully sets out the statutory offense and the basic facts charged, so that neither the grand jury nor the defendants were misled. Count 2 of the indictment charges one offense, and the evidence abundantly supports it, unless there was some error as to its admission.

The defendants duly objected to the court's instruction to the jury, near the end of the government's case, that it was warranted in considering all the evidence against all the defendants. This raises the question whether sufficient concert among them was independently shown. *Lee Dip* v. *United States*, 9 Cir., 1937, 92 F.2d 802, *cert. den.* 303 U.S. 638; *United States* v. *Olweiss*, 2 Cir., 1943, 138 F.2d 798, *cert. den.* 321 U.S. 744.

Evidence introduced by the government and independently admissible, disclosed the following. In 1957, prior to the sale of the ten passenger cars, the railroad had sold two stainless steel dining cars to Bugbee, a Texas dealer in used railway equipment. Throughout this prior transaction the railroad acted through its employee, Bolton, who was the one regularly in charge of such matters. Bugbee resold the cars to the Wabash Railroad. All of these facts were known to all of the officer defendants. On April 30, 1958[9] Bugbee saw Bolton in Boston and indicated an interest in the passenger cars. Bolton replied that they were in use and not for sale. However, on request, he took Bugbee to Glacy. Bugbee inquired if he could have an option to purchase the cars for $500,000. Glacy refused. On April 29 Glacy had received from Benson, the defendant officer in charge of such matters, a current list of equipment available for sale. These cars were not on it. We

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was converted. In *Golden* the question was whether the property misapplied by the defendant had been delivered to him in his capacity as officer of the bank, or as a fiduciary for another.

[9] Unless otherwise noted, all dates refer to 1958.

now recite, under each defendant's name, evidence admissible at least against the stated defendant.

*Mersey*

Mersey's files contained a copy of Benson's "for-sale" list, dated, in Mersey's handwriting, April 30. On it was written in Mersey's handwriting, "add ten stainless cars," with a notation that Mersey was requesting prints. On May 10, after calling several times previously, Mersey reached Bugbee on the telephone, introduced himself, said he "owned" the ten cars, and offered to split with Bugbee whatever the latter could realize above $500,000. On June 25 Mersey telephoned Bugbee and reported that McGinnis had complained to Mersey that Wabash had tried to deal directly with McGinnis. Mersey stated that he had the situation in hand, and that he had told McGinnis so. Bugbee reported, in the same conversation, that Wabash would not pay more than $500,000. On July 17 Bugbee informed Mersey that Wabash's top price was $425,000.

The sale was voted on July 23, and consummated August 14. Between August 13 and December 16, Mersey made payments to the defendant officers totalling $71,500.

*Glacy*

Glacy, in early June, informed Bolton that the sale of the ten cars would not be handled by Bolton, but by Mersey. Bolton objected that it was his job, and raised Bugbee's prior interest. Glacy told Bolton that McGinnis wanted it handled this way. On June 26, the day after Bugbee had told Mersey that Wabash's top price was $500,000, Glacy stated in an office memorandum seeking Benson's pricing of the cars, that similar cars had been bought from the New York Central by Seaboard Airline for $20,000 to $22,000 after it had been "practically ready to buy these

coaches from us." In fact Seaboard had not been practically ready, had bought nothing from New York Central, and had bought cars, the nature of which did not appear, from the C & O for $84,000. On July 18, the day after Bugbee had told Mersey that Wabash's top figure was $425,000, Glacy informed Benson by office memorandum that he had an offer of $250,000, and requested Benson's approval. When the sale was consummated Glacy, upon releasing the cars, accepted a personal check post-dated by eight days. It was customary to require a certified check. The personal check exposed the railroad to serious risk. Mersey was already indebted to the railroad in the amount of $75,000 for a longer time than it was customary to permit, and had a bank balance of only $30,000.

Glacy received and collected payments on two checks, $12,500 each, drawn by Mersey on August 22 and 29.

*Benson*

Benson took Mersey to Bangor on April 30, the railroad paying the air fare. Since no railroad reason for Mersey's trip has been suggested, this indicates, at the least, some intimacy between Benson and Mersey. Benson's retained office copy of his "for-sale" list had a note attached stating that prints of the ten cars had been given Mersey on May 1. Benson, whose duties related to the sale and purchase of equipment, and who could be expected to be knowledgable, in giving Glacy a price of $30,000 on June 30, accepted Glacy's gross misstatement of the New York Central price. When Glacy, by subsequent memorandum, asked approval of $25,000 a car, Benson replied affirmatively, stating the cars were going to require heavy overhaul, at a cost of $25,000 apiece.

Benson received and collected payment on three checks drawn by Mersey on August 13, October 9, and December 16, for $5,000, $1,500, and $5,000, respectively.

*McGinnis*

It was McGinnis' custom, as president, to review the agenda for the directors meeting beforehand. The memorandum presented to the July 23 meeting requesting a vote on the sale of the ten cars did not name the buyer. Nor did it name the railroad officials who were endorsing the sale, but merely stated that it was recommended by "management." These lacunae were both contrary to standard practice. The sale was unanimously voted. In January 1962, McGinnis told an ICC investigator that he had been the one to present the sale to the directors. On the stand he denied this. Glacy and Benson were not directors, and if McGinnis had not sponsored the sale it does not appear who did.

McGinnis received and collected payment on three checks drawn by Mersey—two on October 10, each for $10,000, and one on December 3, for $15,000.

Each officer defendant took the stand and admitted, and sought to explain, receipt of the payments charged to him. Benson testified that his payments were for information and advice allegedly given Mersey in connection with other property Mersey had considered buying from the railroad. In making this explanation Benson, at the least, implicated himself as sufficiently intimate with Mersey to sell him information in clear breach of his fiduciary obligations to his employer.

Glacy testified that his two checks represented two years' salary for consulting services rendered to Mersey. The checks, ostensibly a week apart, were actually contiguous in the checkbook. On Glacy's testimony they represented a payment of the first year's salary nearly eight months later, and of the second year's salary four months prior to the end of the year. Furthermore, Glacy had previously received from Mersey appropriate compensation for the

first year's salary, assuming it was earned at all. As against Glacy's testimony, in January 1962 he had told an ICC inspector that he had never received payments of any description from Mersey or his company.

McGinnis testified that his payments from Mersey had been for services in connection with a transaction referred to as the Schiavone loan. The loan never went through. In January 1962 McGinnis told an ICC inspector that he had never received any payments from Mersey or his company, and specifically, that he had not received $35,000, and that although he had worked on the Schiavone loan, it had not materialized and he had received no fee. There were additional inconsistencies of record in McGinnis' courtroom explanations.

Mersey did not take the stand. His company records showed the various payments, but inconsistently with some of the defendant officers' testimony.

In sum, it could properly be found that each of the defendant officers consciously acted to facilitate the improper sale of the cars. Among other things, Glacy grossly misstated the circumstances of supposedly similar cars being bought by the Seaboard Airline; Benson, within whose expertise such matters lay, acquiesced in his statement, and in the price at which the Boston & Maine cars were ultimately sold; and McGinnis presented the matter of the sale to the board of directors in a significantly unorthodox manner. Even if there were merit in the defendant officers' contention that there was no direct evidence that any of them conspired with each other, a contention which leaves a number of matters unanswered, there was clear evidence that each conspired with Mersey. It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defend-

ants, rather than three isolated bilateral agreements. The court's ruling was amply supported.

Only one further matter merits mention. Some of the testimony damaging to the defendants came from Bugbee, whose accounts of his telephone conversations with Mersey were reinforced by introduction of transcripts of recordings made by Bugbee without the knowledge, and hence consent, of Mersey. Defendants say that the transcripts are rendered inadmissible because their divulgence would violate 47 U.S.C. § 605, the arguably pertinent portion of which reads,

> "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person. . . ."

We agree with the reasoning of the court in *Carnes* v. *United States,* 5 Cir., 1961, 295 F.2d 598, *cert. den.* 369 U.S. 861, holding the transcripts admissible. This result accords not only with the decision of the court in *Rathbun* v. *United States,* 1957, 355 U.S. 107, but, we believe, with the minority opinion as well.

*Affirmed.*

## Appendix B.

The statute involved in the present proceeding is 62 Stat. 730, 18 U.S.C. § 660. The text of the statute is, and at all material times has been, as follows:

> "Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.
>
> "The offense shall be deemed to have been committed not only in the district where the violation first occurred but also in any district in which the defendant may have taken or had possession of such moneys, funds, credits, securities, property or assets.
>
> "A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts."

## Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6653.

DANIEL A. BENSON,
DEFENDANT, APPELLANT,
*v.*
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT

May 25, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
ROGER A. STINCHFIELD
Clerk.